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No. ———

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In The

Supreme Court of the United States

October Term, 1982

NORMAN PERL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit erred in dismissing Petitioner's intermediate appeal from a trial court order denying a motion for a hearing on prosecutorial misconduct when the principal witnesses would be the prosecutor and the petitioner, defendant in the trial court.

2. Whether the United States Court of Appeals for the Eight Circuit erred in dismissing an intermediate appeal from an order denying a motion to dismiss an indictment on the basis of prosecutorial misconduct.

TABLE OF CONTENTS

	Page
Statement of Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting This Petition:	
I. The Supreme Court has held that certain rulings in criminal cases are subject to intermediate appeal	4
II. The conflicting rulings among the various Circuits warrant review by this Court of the appealability of a pre-trial Order denying motion to dismiss for prosecutorial misconduct	5
III. The right to a hearing is inherent in any pre-trial resolution of claims of prosecutorial misconduct	9
IV. The conflicting rules among the various Circuits as to the proper procedure for resolution of claims of prosecutorial misconduct warrant hearing by this Court	10
Conclusion	12
Certificate of Service	13

APPENDIX INDEX

Opinion of the District Court, August 26, 1982 .....A-1
Order of Court of Appeals, September 3, 1982 .....A-17
Order of Court of Appeals Denying Re-hearing, September 23, 1982 .....A-19

TABLE OF AUTHORITIES

Cases:

Abney v. United States, 431 U.S. 651 (1977) 5
Austin v. United States, 297 F.2d 356 (4th Cir. 1961) 10
Blackledge v. Perry, 417 U.S. 21 (1974) 10
Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788 (DC Cir. 1937), *rev. for mootness*, 302 U.S. 658 9
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 545 5
Costello v. United States, 350 U.S. 359 (1956) 10
Helstoski v. Meanor, 442 U.S. 500 (1979) 5
Jackson v. Denno, 378 U.S. 368 (1964) 9
Massey v. Moore, 385 U.S. 105 (1954) 9
United States v. Brizendine, 659 F.2d 215 (DC Cir. 1981) 8
United States v. Calandra, 413 U.S. 338, 344 (1974) 10
United States v. Grabinski, 674 F.2d 677 (8th Cir. 1982) 8
United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981) 6
United States v. Griffin, 617 F.2d 1342 (9th Cir. 1980) *cert. den.* 449 U.S. 863 5
United States v. Litman, 661 F.2d 17 (3rd Cir. 1981) *cert. den.*, 102 S.Ct. 1016, 1447 6
United States v. Rosario, 677 F.2d 614 (7th Cir. 1982) 8

United States v. Serubo, 605 F.2d 807 (3rd Cir. 1979) 9
United States v. Serubo, 604 F.2d 807, 816 (1979) .. 10
United States v. Short, 671 F.2d 178 (6th Cir. 1981), *cert. den.*, 102 S.Ct. 2932 7

Statutes:

28 U.S.C. §1291 2

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Norman Perl, the Petitioner herein, prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Eighth Circuit as entered in the above-entitled matter on September 3, 1982; and the order of the Eighth Circuit denying Petitioner Norman Perl's petition for re-hearing en banc entered on September 23, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as United States v. Norman

Perl, —— F.2d —— (8th Cir. 1982). A copy of the Eighth Circuit's opinion has been included in the Appendix (Appendix B at page A-17). The Eighth Circuit denied Petitioner Norman Perl's Petition for Re-Hearing En-Banc, without opinion, on September 23, 1982. A copy of the Eighth Circuit order has been included in the Appendix (B at page A-17). The United States District Court for the District of Minnesota denied Petitioner's motion for an evidentiary hearing on the alleged prosecutorial misconduct and denied Petitioner's motion to dismiss the indictment because of prosecutorial misconduct. The order of the United States District Court for the District of Minnesota has been included in the Appendix (A at page A-1).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit filed its order on September 3, 1982 (B at page A-17). The Eighth Circuit denied Petitioner's motion for re-hearing en banc on September 23, 1982 (C at page A-19). The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1) of the United States Code.

STATUTE INVOLVED

The statute involved in the present case is Title 28, United States Code, Section 1291.

That statute, 28 U.S.C Section 1291 provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On February 23, 1982, Petitioner Perl brought civil action for injunctive relief before the United States District Court, District of Minnesota, Fourth Division, to enjoin Assistant United States Attorney Richard Vosepka from appearing before, presenting evidence to, or in any manner assisting United States Grand Jury conducting an investigation into Mr. Perl and others; and the basis for that complaint for injunctive relief was the allegation of Mr. Vosepka's misconduct which had prejudiced the Grand Jury.

The United States District Court denied that motion but sealed the indictment pending review by the Court of Appeals.

The Court of Appeals for the Eighth Circuit on March 5, 1982 issued an order remanding the matter to the United States District Court but stating the following:

> Although petitioners' claims on their face involve potential misconduct, the District Court is a proper initial forum for such factfinding. The petitioners remain free to raise the claims made here by way of motion to quash the indictment or other appropriate proceedings in the District Court.

Following remand from the Court of Appeals, the United States District Court arraigned petitioner Perl and the co-defendants in March, 1982.

Petitioner Perl filed timely motion to dismiss the indictment on the ground of prosecutorial misconduct. The principal witnesses would be the prosecutor for examination as to his conduct before the United States Grand Jury and Petitioner Perl for the presentation of the evi-

dence which he had documented and was prepared to present in writing and orally before the United States Grand Jury but was foreclosed from doing so by the prosecutor. The documents, relevant transcripts, and affidavits were filed in the District Court in support of the motion to dismiss for prosecutorial misconduct.

The District Court, see Appendix A, p. A-15, on August 26, 1982 denied the motion for an evidentiary hearing to establish the factual predicate for the motion to dismiss for prosecutorial misconduct; and the District Court denied the motion to dismiss the indictment, which motion had been based upon the allegation of prosecutorial misconduct.

The Court of Appeals, Appendix B, p. A-17, on September 3, 1982 dismissed the District Court order denying the motion to dismiss for prosecutorial misconduct as an interlocutory order. The Court of Appeals on September 23, 1982, Appendix C, denied the motion for re-hearing *en banc*.

The Court of Appeals and Circuit Justice Blackmun denied Petitioner's motions for a stay of the trial, and the trial commenced on September 7, 1982 and will continue for several months.

REASONS FOR GRANTING THIS WRIT

I.

The Supreme Court has held that certain rulings in criminal cases are subject to intermediate appeal.

A pre-trial order denying a motion to dismiss an indictment on double jeopardy grounds is a complete, formal, and final rejection of that double jeopardy claim.

It is collateral to and separable from the principal issue of the accused's impending criminal trial. It is therefore appealable. The elements of the claim are completely independent of guilt or innocence. *Abney v. United States*, 431 U.S. 651 (1977). A member of Congress has right to an intermediate appeal from the Order denying a motion to dismiss an indictment on the ground that it violates this Speech or Debate Clause of the Constitution. *Helstoski v. Meanor*, 442 U.S. 500 (1979). These rulings relied on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 545.

II.

The conflicting rulings among the various Circuits warrant review by this Court of the appealability of a pre-trial Order denying motion to dismiss for prosecutorial misconduct.

The Court should exercise its discretion in granting *certiorari* in the present case because of the importance of determining the proper pre-trial procedure on a motion to dismiss for proscutorial misconduct. The Courts of Appeals for the various circuits have ruled on this matter in various ways. The principal decisions touching on this problem are as follows:

Ninth Circuit. In *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980), *cert. den.* 449 U.S. 863, Griffin was indicted for embezzlement. The Ninth Circuit held that the denial of the motion is a complete and final determination of the vindictive prosecution claim; all the facts relevant to the claim would be known before trial; the claim is collateral to the issue of guilt or innocence of the accused. 617 F.2d 1345.

The District Court's Order in the present case demonstrates that there are two critical witnesses, neither one of whom may be guaranteed to testify at trial. One is the prosecutor, and the other is petitioner. Furthermore, that Order demonstrates the abuse of witnesses who may not testify, that is co-defendants, and the use of exhibits which may never be offered in evidence. Further, the treatment of this petitioner in his voluntary appearance before the Grand Jury was so atrocious as to result in hostility, barring him from presenting testimony about the credibility of critical government witnesses.

Third Circuit. In *United States v. Litman*, 661 F.2d 17 (3rd Cir. 1981), *cert. den.* 102 S. Ct. 1016, 1447 the trial court denied a motion to dismiss for prejudice resulting from the Grand Jury violation of the rule of secrecy. The Court of Appeals said:

> Denial of a motion to dismiss an indictment is a collateral Order which may not be appealed unless the Order has conclusively determined the claim, has resolved an issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment because the right at issue would be irreparably lost were the case to proceed to trial. 661 F.2d 18.

Fifth Circuit. In *United States v. Gregory*, 656 F.2d 1132 (5th Cir. 1981), the Court of Appeals dismissed the intermediate appeal. The Court restricted its ruling and pointed out that an immediate appeal is appropriate when that is the only way to protect a unique right. 656 F.2d 1134. The allegation with regard to prosecutorial vindictiveness was that the prosecutor was "after" the defendants. The lower Court was affirmed for denying a

hearing where the allegations were "mere conclusory" allegations of vindictiveness. The Court specifically stated that some vindictiveness claims might be destroyed if appeal were delayed. The example there was a prosecution for reasons unrelated to enforcement of the law. 656 F.2d at 1156. That touches close to the present case, where petitioner's right will be irretrievably lost for failure to have an evidentiary hearing, for at trial the exhibits may not be offered, the transcripts of petitioner's Grand jury testimony may not be offered, the prosecutor will not testify, and petitioner need not testify. Thus, the right against prosecutorial vindictiveness has been irretrievably lost by the denial of the motion.

Sixth Circuit. In *United States v. Short*, 671 F.2d 178 (6th Cir. 1981), *cert. den.* 102 S.Ct. 2932, the accused alleged prosecutorial misconduct because of misrepresentations as to whether he was a target when he appeared before the Grand Jury. The District Court reviewed the transcripts and found no misconduct. There was an intermiate appeal, and the Court of Appeals for that Circuit said that some authorities hold that misconduct may not be raised as part of a pre-trial appeal. It added:

> Absent compelling circumstances which would prevent meaningful review following trial, the strong policy of this Court against piece-meal review leads to the conclusion that ordinarily a claim of prosecutorial misconduct is reviewable only after trial. However, the District court made a specific finding on the issue, and forwarded the Grand Jury transcript to this Court under seal. Since we have the entire record before us on the Government's appeal, and a clear ruling by the District Court on the issue, judicial economy will be served by deciding it at this time. 671 F.2d at 188.

The Court after holding the issue appealable affirmed the lower court on that issue.

Seventh Circuit. In *United States v. Rosario*, 677 F. 2d 614 (7th Cir. 1982), the accused there actually had an evidentiary hearing, unlike the present case, and the Court of Appeals ruled that the Order denying the motion to dismiss was not appealable. The Court relied on the assumption that the accused could vindicate the rights against misconduct on appeal after conviction.

Eighth Circuit. In *United States v. Grabinski*, 674 F. 2d 677 (8th Cir. 1982), the sketchy motion to dismiss asserted prosecutorial vindictiveness after he had successfully changed venue on earlier charges was held inadequate for dismissal in the District Court. The Court of Appeals for the Eighth Circuit held that it was not subject to intermediate appeal. Circuit Judge Heaney concurred only with respect to the result on that issue, and three Circuit Judges dissented. Chief Judge Lay said that the Order was a final disposition of the issue and not an element of the merits. Chief Judge Lay in his dissent said:

> Even if a conviction is subsequently reversed, the anxiety produced by the increased risk involved in standing trial on the new charges and the added expense and difficulty of defending against the charges would deter defendants from utilizing procedural rights. 674 F.2d 683.

That seems to be the prologue to this petitioner, who would not voluntarily testify in a Grand Jury as a target defendant if he had known the type of treatment that he actually did receive.

DC Circuit In *United States v. Brizendine*, 659 F.2d 215 (DC Cir. 1981), the motion to dismiss was issued in

reliance upon the absence of a controlling Supreme Court precedent. 659 F.2d 220. The misconduct there revolved around assertions of the plea bargaining process. For lack of controlling precedent, the Court held that there was no intermediate appeal right.

None of the cases precisely relating to the appealability of a vindictiveness ruling against the accused involves the detailed evidence of misconduct with the finality to such an extent as we have in the present petition. The reason for that is that the documents in the present case and the two critical witnesses, the petitioner and the prosecutor, need not even testify at the trial. Thus, it is absolutely critical that an evidentiary hearing be accorded to petitioner.

III.

The right to a hearing is inherent in any pre-trial resolution of claims of prosecutorial misconduct.

It would appear that an evidentiary hearing is not dependent upon a specific statute or rule for the resolution of a factual dispute. See *Clarksburg-Columbus Short Route Bridge Co. v. Woodring*, 89 F.2d 788 (DC Cir. 1937), *rev. for mootness*, 302 U.S. 658. Adequate resolution of the issue of a coerced confession depended upon an evidentiary hearing. *Jackson v. Denno*, 378 U.S. 368 (1964). Mental competence at the time of trial requires an adequate hearing outside of the jury's presence. *Massey v. Moore*, 385 U.S. 105 (1954). Adequate trial of prosecutorial misconduct depends upon adequate discovery. *United States v. Serubo*, 605 F.2d 807 (3rd Cir. 1979). When loss of rights under the constituion has been adequately alleged, a hearing is required; the Court

should enter findings of fact and conclusions of law. *Austin v. United States*, 297 F.2d 356 (4th Cir. 1961).

Petitioner has not been accorded any evidentiary hearing. On the strong showing made, under oath, it is inconceivable that due process of law can be accorded to petitioner without an adverse, evidentiary hearing on issues which undoubtedly will never be resolved at trial.

IV.

The conflicting rules among the various Circuits as to the proper procedure for resolution of claims of prosecutorial misconduct warrant hearing by this Court.

The Court should consider proceedings in the District Court because of the importance of determining the proper pre-trial procedure on a motion to dismiss for prosecutorial misconduct. To the extent that the misconduct affects the Grand Jury proceedings, petitioner's right to consideration by an unbiased Grand Jury, as guaranteed by the Fifth Amendment, is violated. *Costello v. United States*, 350 U.S. 359 (1956). Prosecutorial misconduct may infect the Grand Jury proceedings. *United States v. Serubo*, 604 F.2d 807, 816 (1979). Opportunities for vindictiveness may deprive an accused of due process of law. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). The proceedings in the District Court involve an arbitrary exclusion of much information. This Court has held that a Grand Jury investigation is not fully completed until all available clues have been run down and all witnesses examined "in every proper way." *United States v. Calandra*, 413 U.S. 338, 344 (1974).

Petitioner if accorded opportunity to present argument will propose that the Court resolve the conflicts among the Circuits with respect to the procedural devices available for the resolution of claims of prosecutorial misconduct.

Petitioner will propose the following types of procedural advices:

1. *Conclusive evidence of misconduct.* Certain activities by the prosecutor would necessarily result in proof of misconduct that however explained would not save charges. A *per se* misconduct would leave nothing to evaluate as a matter of law. See *Jackson v. Walker*, 585 F.2d 139, 148 (1978).

2. *A prima facie case of misconduct.* Certain cases involve allegations of severe importance but may be explainable. The procedure should be established to have the trial court declare a *prima facie* case made by the accused with a transfer of either the burden of proof or risk of non-pursuasion to the Government to exonerate itself of the *prima facie* case.

3. *Full evidentiary hearing.* Certain cases involve less than the specificity involved in the present case and may warrant a full evidentiary hearing with the burden remaining on the accused.

CONCLUSION

The unique nature of a motion to dismiss an indictment on the basis of a detailed allegation of prosecutorial misconduct mandate that specific pre-trial procedures be established by this Court in order that all Circuits have guidance as to a resolution of the evidentiary disputes and resolution of the defendant's rights for hearing. This litigation presents the Court with the proper factual predicate to determine the right to an evidentiary hearing and the placement of the burden of proof, depending upon the weight of the evidence as evaluated by this Court. An evidentiary hearing is almost synonomous with due process of law. A conviction following a trial which proceeds without the adversary, evidentiary hearing would have to be set aside. Pre-trial procedures should be established by the Court by the granting of this writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As one of the attorneys for the Petitioner herein, I do hereby certify that pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, I caused three copies of the Petitioner's Petition for a Writ of Certiorari to be served upon the following:

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by United States Mail, postage prepaid, on this 1st day of October, 1982.

/s/ Patrick J. Foley
(Original signed by Patrick J. Foley)